United States Court of Appeals for the Second Circuit



APPELLANT'S BRIEF

74-1219

To be argued by HENRY J. BOITEL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1219

UNITED STATES OF AMERICA,

Appellee,

v.

ARIEL POMARES and ANTONIO VECIANA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN BEHALF OF APPELLANTS
ARIEL POMARES and ANTONIO VECIANA



HENRY J. BOITEL
Attorney for Appellants
233 Broadway
New York, New York 10007
(212) RE 2-8104

Of Counsel
BARRY L. GARBER
ABRAHAM H. BRODSKY

TABLE OF CONTENTS

	AUL
Questions Presented For Review	1
Preliminary Statement	3
Statement of Facts	5
1. Synopsis	5
2. The Testimony of Augustin Barres	7
a. The First Transaction	9
b. The Second Transaction	11
c. The Third Transaction	12
3. Barres' Credibility	15
4. The Post-Arrest Statements of the Defendant Pomares	16
ARGUMENT:	
Point I—Prior To Trial, And On The Record, The Government Unequivocally Waived, By Stipulation, Any Right It Might Otherwise Have Had To Introduce Into Evidence Certain Pre-trial Admissions Allegedly Made By The Defendant Pomares. During The Course Of The Trial, The Government Was Wrongfully Permitted To Violate That Stipulation To The Improper Prejudice Of Both Defendants. Due Process Of Law And The Proper Administration Of Justice Were Thereby Violated And The Defendants Should Be Granted A New Trial	
A. The Underlying Facts	17
B. The Admission Of The Statements Was Vio- lative Of Due Process And The Proper Ad- ministration Of Justice In The Federal Courts	24

Point II—The Evidence At Trial Failed To Establish That The Alleged Admissions Of The Defendant Pomares Were Voluntary Or That Pomares Had Been Properly Advised Of His Rights	30
A. The Underlying Facts	30
B. The Manner In Which Pomares Was Ques- tioned And Advised Of His Rights Failed To- Meet Federal Constitutional Standards	36
Point III—The Defendant Pomares Was Deprived Of His Fifth Amendment Right To Remain Silent By The Testimony Elicited From Agent Pinol Under Direct Examination To The Effect That Pomares Had Refused To Further Cooperate With The Government And Had Requested Immunity	40
A. The Underlying Facts	40
B. The Revelation To The Jury Of The Defendant Pomares' Claim Of Fifth Amendment Privilege Constituted An Impermissible Violation Of That Privilege	43
Point IV—The Jury Should Have Been Charged, As Requested By The Defense, That If They Found The Alleged Pomares Statement Unreliable, They Were Entitled To Completely Disregard It	45
POINT V—The Defendant Veciana Should Have Been Granted A Separate Trial From The Defendant Pomares	48
Point VI—The Defendants Veciana And Pomares Were Wrongfully Prejudiced And Deprived Of Their Right Against Self-incrimination By The Prosecutor's Argument To The Jury That They Should Have Cooperated With The Government, As Did Barres, Instead Of Protesting Their Innocence	52

Point VII—The Prosecutor's Summation Improperly Distorted The Testimony Of The Prosecution Wit- ness, Lopez, To The Prejudice Of Both Defendants, And Thereby Converted That Testimony Into A Violation Of The Rights Of The Defendant Pomares Under Bruton v. United States, 391 U.S.	
123 54	1
Point VIII—At Trial, The Government Improperly Expanded The Scope Of The Indictment To Cover Crimes Not Charged In The Indictment. More- over, The Defense Was Not Advised In Advance Of Trial That The Government Had So Expanded The Scope Of The Indictment	8
POINT IX—In His Summation, The Prosecutor Became An Unsworn Witness Against The Defendants By Placing Before The Jury, In Summation, Alleged Facts Which Were Not Shown By The Evidence	35
CONCLUSION	70
AUTHORITIES CITED	
Cases:	
Bruton v. United States, 391 U.S. 123 (1968) 27, 48, 49,	56
	36
	37
	53
	37
	36
	46
Lego V. Twomey, 404 U.S. 411 (1912)	
Miranda v. Arizona, 384 U.S. 436 (1966) 36-38,	4

PAGE
People v. Christman, 23 N.Y. 2d 429, 297 N.Y.S. 2d 134 (1969)
People v. Russell, 66 Cal. Rptr. 594 (C.A. Dist., 1968) 39
Richardson v. United States, 150 F.2d 58 (6th Cir., 1945)
Sullivan v. Scafati, 428 F.2d 1023 (1st Cir., 1970) 26
United States v. Byrd, 352 F.2d 570 (2nd Cir., 1965) 60-62
United States v. Crisp, 435 F.2d 354 (7th Cir., 1970), cert. denied, 402 U.S. 947
United States v. DeAngelis, 490 F.2d 1004 (2nd Cir., 1974)
United States v. Mullings, 364 F.2d 173 (2nd Cir., 1966)
United States v. Rodriguez, 241 F.2d 463 (7th Cir., 1957)
United States v. Schor, 418 F.2d 26 (2nd Cir., 1969) 26
United States v. Smith, 16 F.R.D. 372 (W.D. Mo., 1954)
United States ex rel. Vanderhorst v. LaVallee, 285 F. Supp. 233, aff'd, 17 F.2d 411, cert. denied, Mc-
Mann v. Vanderhorst, 397 U.S. 925 37 United States ex rel. Williams v. Twomey, 467 F.2d 1248 (6th Cir., 1972)
Constitution and Rules:
Fifth Amendment 2, passim
Sixth Amendment
Rule 14, Federal Rules of Criminal Procedure 51

Other Authorities:

PA	GE
American Bar Association Standards, Discovery and Procedure Before Trial (approved draft, 1970), § 5.3(d)	26
Burnett, Pre-Trial Conference, Criminal Defense Techniques, § 20.05[2]	28
8 Moores Fed. Practice, Cipes Ed., Criminal Rules, § 8.02[1] (1970)	51
Orfield, Criminal Procedure under the Federal Rules, §§ 26:777.778, Vol. IV	28

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-8098

UNITED STATES OF AMERICA,

Appellee,

-v.-

ARIEL POMARES and ANTONIO VECIANA,

Defendants-Appellants.

On Appeal From The United States District Court For The Southern District Of New York

BRIEF IN BEHALF OF APPELLANTS
ARIEL POMARES and ANTONIO VECIANA

QUESTIONS PRESENTED FOR REVIEW

- At trial, the Government was permitted to place in evidence an alleged pre-trial confession of the defendant Pomares.
- A. With respect to both defendants, was it an abuse of discretion and a violation of due process and of the proper administration of justice in the Federal Courts for the confession to be admitted

into evidence despite the Government's pre-trial waiver in the form of an unequivocal pre-trial representation by the Government that the confession would not be used at trial?

- B. Was the confession secured from the defendant Pomares by means of a violation of his Fifth and Sixth Amendment rights to remain silent and to be represented by counsel? Was this so in view of the surrounding circumstances, the delay in bringing the defendant before a Magistrate, and the repeated assertions of the interrogating agents that the exercise of his right to remain silent and to be represented by counsel would work to his disadvantage?
- C. Was the defendant Pomares deprived of his right to remain silent when, at trial, the Government elicited from the interrogating agent the fact that, following his initial alleged confession, the defendant refused to further "cooperate" with the Government?
- 2. Should the jury have been charged, as requested by the defense, that if they found the alleged Pomares statement unreliable, they were entitled to completely disregard it?
- 3. Should the defendant Veciana have been granted a severance?

- 4. Were the defendants improperly prejudiced by the Government's argument in summation that the defendants should have cooperated with the Government and, if they had done so, the flow of cocaine to the United States would thereafter have been diminished?
- 5. Did the Government's reference to the alleged post-conspiracy inculpatory conduct of Veci-ana violate the rights of the defendant Pomares under Bruton v. United States, 391 U.S. 123 (1968)?
- 6. Did the prosecutor become an unsworn witness against the defendants by arguing facts in summation which had not been shown by the evidence?
- 7. Was the Government improperly permitted to expand the scope of the indictment to cover crimes not charged in the indictment and not otherwise revealed to the defense in advance of trial?

PRELIMINARY STATEMENT

Antonio Veciana and Ariel Pomares appeal from judgments of conviction entered against them on March 13, 1974, after a jury trial before the Hon. Dudley B.

Bonsal, in the United States District Court for the Southern District of New York.

The indictment (which superseded a prior indictment [A. 5-7]), was in two counts (A. 8-11), and was filed on January 4, 1974. Both defendants were named in both counts.

Count 1 charged that the defendants, together with an unindicted co-conspirator, Augustin Barres,* conspired to possess and distribute cocaine during the period commencing November 1, 1972, up to and including the date of the filing of the indictment (21 U.S.C. § 846). Various overt acts were alleged to have been committed, in furtherance of the conspiracy, on July 21 and July 23, 1973.

The second count charged that, on July 23, 1973, the defendants possessed, with intent to distribute, seven kilograms of cocaine hydrochloride [21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(A)].

Trial commenced on January 8, 1974, and continued until January 14, 1974, when the jury returned its verdicts convicting both defendants as to both counts.

Following the trial, the defense moved, by

^{*} Prior to trial, Barres pled guilty to conspiracy as charged in a criminal information filed against him (A. 354).

written motion, for a new trial upon the ground of various designated errors which had been committed at trial (A. 777-793). The motions were denied on the date of sentence (A. 794-796).

On March 13, 1974, the defendant Veciana, who had never before been convicted of a crime, was sentenced to a term of seven years imprisonment upon each count, to run concurrently, and to be followed by a three year period of special parole. By order of the trial Judge, he is currently enlarged on bail pending appeal (A. 797).

On the same day, the defendant Pomares, who had never before been convicted of a crime, was sentenced to a term of five years imprisonment on each count, to run concurrently, and to be followed by a three year period of special parole. By order of the trial Judge, bail pending appeal was set at \$ 75,000; however, the defendant has been unable to post bail, and he is, therefore, incarcerated (A. 798).

A Notice of Appeal, in behalf of both defendants, was filed on or about March 18, 1974.

STATEMENT OF FACTS

1. Synopsis

On July 23, 1973, Augustin Barres, sold approximately seven kilograms of cocaine hydrochloride

to an undercover agent. The agent was a New York City Detective acting under the auspices of the FederalState Joint Task Force. Barres was immediately arrested, and, thereafter, he confessed his guilt and, allegedly,* implicated the defendants Pomares and Veciana.

Thereafter, the defendant Pomares was arrested at his home in Puerto Rico. Following his arrest, he allegedly made certain inculpatory admissions which were used against him in evidence at trial.** Defendant Veciana was also arrested, but is not alleged to have made any admissions.

The Government's chief witness at trial was the alleged co-conspirator, Barres. He directly inculpated both defendants in a conspiracy to traffic in cocaine, and alleged three instances of importation and distribution, two of which were not alleged by the indictment.***

The remainder of the Government's evidence consisted of: 1) the testimony of the undercover agent as to his dealings with Barres. None of that testimony inculpated either of the defendants; 2) circumstantial

^{*} See Point IX, infra, at p.65.

^{**} See Points I and II , infra, at pp.17-39.

^{***} See Point VIII, infra, at p.58.

evidence which the Government alleged tended to support Barres' version of events, including evidence that
the three men met and conversed and had dealings with
each other in Miami. None of this evidence was even
remotely inculpator; unless Barres' version of the
events were true; 3) the post-arrest admissions of
the defendant Pomares, which were admitted into evidence solely against him.

Neither of the defendants testified at trial. The only defense witness was the teenage daughter of the defendant Veciana, who testified that, contrary to Barres' testimony, Veciana did not have a package with him at the time of a certain meeting.

2. The Testimony of Augustin Barres*

Barres, a native of Cuba and a former member of the Castro Government, was permitted to immigrate to the United States in 1961. He settled in Puerto Rico, where he eventually obtained an office job with a construction company. He resigned that position in 1967 to become self-employed as a distributor of automotive products (Freca Imports) and, additionally, to deal in FHA mortgages and to invest in land. In his

^{*} It must, of course, be kept in mind that we are setting forth the allegations of Barres. By their pleas of not guilty, the defendants Pomares and Veciana denied the truth of all these allegations.

new enterprises, he regularly visited New York and Florida (A. 148-154).

Barres claims to have known Veciana since 1963 and to have become his friend in 1970. At that time, Veciana, the leader of a substantial anti-Castro movement, was employed by the United States Government for the purpose of giving banking advice to the Bolivian Government. Barres would occasionally see Veciana when Veciana would return from his trips to Bolivia (A. 154-155).

FE

Barres first met Pomares in 1967, and employed him as a salesman for Freca Imports. Eventually, Pomares became Barres' "right hand man" and practically ran the company for him. By 1971, however, Pomares, too, became involved in land ventures, and devoted only a small part of his time to the operation of Freca. Indeed, it was necessary for Barres to offer various inducements to Pomares in an effort to get him to remain with Freca (A. 155-156).

In late 1971, Barres and Veciana met in Puerto Rico, and Barres asked Veciana about the availability of cocaine in Bolivia. Veciana responded that there were great quantities of the substance readily available there. According to Barres, prior to and during this time, he and Veciana invested together in the

sponsorship of various athletic contests (A. 158-159).

According to Barres, in 1972, his liquid assets suffered a setback due to a tie-up of funds in a land deal and due to losses in investments in sporting events (A. 159-165).

a. The First Transaction

In April, 1972, during a discussion between Barres and Veciana concerning their financial situation, the subject again turned to cocaine. At trial, Barres conceded that he may have been the one who raised the subject. He claimed that Veciana said he could easily obtain a kilo of cocaine which could be brought into the country by means of "the government APO system." In late May, the two men met again with Pomares present. In the interim, Barres had raised the subject with Pomares, telling him that there was a possibility that Veciana could obtain cocaine in Bolivia, and asking Pomares if he knew where they could sell it. Pomares allegedly responded that he would try to find some friends that he had not seen for years and who were residents in Miami. According to Barres, Pomares, himself, had never before been involved in this sort of thing (A. 165-168).

Veciana returned in late May, and allegedly claimed that he had made contact with a man in charge

of Interpol in Bolivia who offered to make cocaine available. The cost, per kilo, delivered to the United States, was to be as follows: \$ 2,000 to the cocaine factory, \$ 1,000 to the Interpol official, and \$ 1,000 to a diplomat who was to bring the cocaine to the United States. The total cost, per kilo, would be \$ 4,000 (A. 168-169).

In the interim, Pomares, allegedly, had made contact with someone in Miami, identified only as "the midget" who was to act as a middleman for the sale of the cocaine. The ultimate purchaser was someone identified only as "the old lady". The "old lady" allegedly agreed to purchase the cocaine at \$ 12,500 per kilo, \$ 500 of which was to be retained by the "midget" (A. 170). It was, allegedly, arranged that Veciana would have the diplomat (also unidentified), bring into the United States five kilos of cocaine at \$ 4,000 per kilo. This \$ 20,000 purchase price was underwritten equally by Veciana and Barres (A. 171).*

^{*} Government Exhibits 1 and 2 (A. 173-174, 187) were, respectively, the bank receipt and bank check representing a \$ 10,000 payment by Barres to Veciana. Although Barres claimed that this represented his half of the purchase price, he was not able to document that claim, particularly in light of other, legitimate financial transactions between the two men.

The five kilos of cocaine allegedly arrived in Miami in August or September, 1972. Barres testified that he and Pomares received it from Veciana and thereafter measured and packaged it, and the resale was consummated as planned (A. 175-200).*

b. The Second Transaction

As the first transaction was reaching its conclusion, Veciana allegedly told Barres that the diplomat who had transported the initial shipment was about to be transferred, but, in the process, would be able to bring ten or twelve kilos of cocaine into the United States with his furniture (A. 200). Following essentially the same procedures as those utilized in the first transaction, and financing the venture with the profits** from the first transaction, the ten kilos of cocaine were, allegedly, received and then

^{*} Barres' testimony with regard to this alleged first transaction, which completely pre-dated the conspiratorial period set forth in the indictment, involved extended claims concerning the "midget", the "old lady", the "diplomat" and the Interpol official, as well as distribution of the cocaine and the collection and distribution of the money. None of this was corroborated in any respect.

^{**} According to Barres, the proceeds of these ventures were kept in a bank safe deposit box to which both Barres and Pomares were authorized access. Aside from Barres' bare word as to what was kept in the box, there was no evidence to support this claim (A. 202-209). In this connection, it must be recalled that Barres and Pomares operated legitimate businesses together.

resold during the period from August, 1972 to April, 1973. Again, the conduit was "the midget" and the ultimate recipient was unknown (A. 200-232).

During the course of the second transaction, an apartment was rented in Pomares' name, as an officer of Occidental Enterprises, a company which had been created by Barres (A. 157, 216; Gov. Exh. 4). According to Barres, the apartment provided a place where the cocaine could be measured, repackaged and hidden. In fact, following Barres' arrest, a search warrant was executed upon the apartment and some cocaine was discovered in a secret kitchen compartment, together with a scale (A. 565).*

c. The Third Transaction

Upon the completion of the second transaction, it allegedly became necessary for Veciana to recruit a new diplomat to bring the next shipment into the United States since the initial diplomat had now settled in the United States (A. 213-214, 233). Similarly, Pomares and Barres allegedly developed doubts as to the reliability of the "Midget". It was at this point that Barres recalled that he had a Mafia acquain-

^{*} In this connection, it should be recalled that Pomares was Barres' man Friday. As Barres admitted, he, himself, resided at the apartment (A. 255), and he referred to it in his testimony as "my apartment" (A. 261). Additionally, Barres' friends knew it to be his apartment (A. 465-466, 487-488).

tance in New York City, and he decided to contact that individual as a possible purchaser (A. 231, 239-243).

Barres went to New York in July, 1973, found the acquaintance (identified only as "Tony"), and, when the subject of cocaine was raised, Tony said that he had a cousin who might be interested. In fact, Tony was an informant, and his "cousin" was Detective Bruno of the New York City Police Department (hereinafter, "Bruno").*

Following initial arrangements, Barres brought Bruno a sample of the cocaine on July 16, 1973, and it was agreed that, as soon as he was able, Barres would bring the shipment to New York. Significantly, Barres told Bruno that the person who would actually carry the substance to New York would be a woman (A. 245-252). Upon returning to Miami on July 18, 1973, Barres allegedly received word from Veciana that the 10 kilo shipment had arrived. Since Pomares was then out-of-town, it was agreed that they would all meet at the apartment on July 21st, at which time Veciana would turn over the cocaine (A. 257-261).

On the appointed day, the three men met, and

^{*} At trial, the defense conceded the truth of Detective Bruno's testimony concerning his dealings with Barres. Bruno had no dealings with Pomares and Veciana.

Veciana advised that the cocaine was downstairs in the car. As he was about to go get it, Barres received an unexpected visit from two friends, Lopez and Figueroa, and the meeting was called to a close before the transfer could be effectuated. Upon the arrival of the two friends, Pomares and Veciana left the apartment.* Shortly after the friends left, Pomares came up to the apartment with a shopping bag containing the cocaine. He allegedly claimed that Veciana had given the shopping bag to him in the parking lot** (A. 264-269).

Barres and Pomares then, allegedly, weighed and repackaged the cocaine. Seven kilos, the amount to be sold to Bruno, were packed in a suitcase. The remaining three kilos were placed in a secret compartment in the apartment, where it was, after the arrest of Barres, found by the police pursuant to a search warrant (A. 276-277).

On the morning of July 22nd, Pomares left for New York via train, arriving on the morning of July 23rd. He registered at the Americana Hotel. Barres

^{*} Both Lopez and Figueroa testified as Government witnesses. They could only say that they came upon a meeting of the three men. See PointVII, infra, at p.54.

^{**} Ana Veciana, the defendant's seventeen year old daughter, testified as a defense witness. She was waiting for her father in the car on this day and she did not see any package in her father's possession or in the car (A. 629, et seq.).

left for New York by air on July 22nd; arriving that evening, he registered at the Taft Hotel, and then met with "Tony" to finalize plans for the transfer that was to take place on the following day (A. 278-280).

On the morning of July 23rd, Barres allegedly met with Pomares at the Americana, gave him the key to a room adjoining his own at the Taft Hotel, and instructed him to leave the suitcase of cocaine in the room. Barres then returned to his own room at the Taft, where he mot with Bruno. During the meeting, he received a telephone call, allegedly from Pomares, advising him that the suitcase had been placed. At that point, Barres went to get it, brought it back to Bruno, and soon found himself surrounded by a large number of police.*

3. Barres' Credibility

On cross-examination, the defense sought to discredit Barres' credibility upon a number of grounds.

His motivation to appear to be cooperating with those who arrested him was self-evident, since he was caught in the act and hoped for lenient treatment. It was significant that in naming Veciana, he targetted a mil-

^{*} It is significant that, with all these police waiting to pounce upon Barres, none of them saw Pomares at any point, when, according to Barres, Pomares placed the suitcase in the adjoining room during the course of the meeting with Bruno.

itant anti-Castroite (A. 362). Barres, himself, had been employed in a number of substantial positions by the Castro government (A. 357-362). When Barres left Cuba in 1961, he came to the United States, by his own admission, with less than \$ 10,000 (A. 360). Nevertheless, by June, 1970, he had amassed a net worth of \$ 202,025.00 (A. 446). Moreover, by April 30, 1972, as shown by his certified balance sheet (Pomares Exhibit A for identification), he had amassed a net worth of \$ 1,310,510.00.*

Additionally, the defense explored Barres' history of psychiatric treatment (A. 379-381), and his history of difficulties with the Internal Revenue Service (A. 406-411, 423-427).

4. The Post-Arrest Statements of the Defendant Pomares

The post-arrest statements of the defendant Pomares are discussed fully in Points I and II of our argument.

^{*} Cross-examination concerning Barres' April 30, 1972 net worth appears at A. 447-453. The Court denied the defense efforts to place Pomares Exhibit A and another balance sheet, Exhibit B, into evidence (A. 453-454). Barres' financial assets were particularly significant in two respects: 1) if he had not engaged in illegal activities or drug traffic prior to the events as to which he testified at trial, how did he amass such wealth, having started as a loor-to-door salesman?, and 2) since Barres claimed that his entry into the alleged conspiracy was prompted by financial difficulties (A. 403, 427-428), that claim did not square with the financial scene depicted by his certified balance sheets.

ARGUMENT

POINT I.

PRIOR TO TRIAL, AND ON THE RECORD, THE GOVERNMENT UNEQUIVOCALLY WAIVED, BY STIPULATION, ANY RIGHT IT MIGHT OTHERWISE HAVE HAD TO INTRODUCE INTO EVIDENCE CERTAIN PRETRIAL ADMISSIONS ALLEGEDLY MADE BY THE DEFENDANT POMARES. DURING THE COURSE OF THE TRIAL, THE GOVERNMENT WAS WRONGFULLY PERMITTED TO VIOLATE THAT STIPULATION TO THE IMPROPER PREJUDICE OF BOTH DEFENDANTS. DUE PROCESS OF LAW AND THE PROPER ADMINISTRATION OF JUSTICE WERE THEREBY VIOLATED AND THE DEFENDANTS SHOULD BE GRANTED A NEW TRIAL.

A. The Underlying Facts

On October 4, 1973, at a stenographically reported pre-trial conference, the Government unequivocally declared it would not place in evidence a post-arrest statement allegedly given by the defendant Pomares. The matter arose as follows:

"[Counsel for defendant Veciana]: There was another matter
that obviously Mr. Bannigan and I
discussed and he has to make a decision on, and that is a potential
severance problem under Bruton
since one of the defendants did
give a statement and the other one
did not.

"[Prosecutor*]: I can resolve

^{*} Until a week or so before trial, and at this pretrial conference, the Government was represented by Mr. Bannigan. Thereafter, the Government was represented by Mr. Littlefield.

that right now. We will not use the statement.

"The Court: You will not use the statement. Then there is no problem under Bruton." (A. 19)

By the time of trial, the Government sought to change its position. In the interim, responsibility for the prosecution had been transferred from one Assistant United States Attorney to another. Apparently unaware of his predecessor's commitment with regard to the statement, the new prosecutor, in discussing the strength of his case with defense counsel, alluded to the Pomares statement. He was immediately advised that the Government had formerly represented that it would not use the statement. On the first day of trial, the Government persisted in its insistence on using the statement, and the matter was discussed with the trial Judge. Mr. Littlefield, the prosecutor, made the following assertion during the course of the conference:

"So the record is clear I have conferred with Mr. Bannigan and he said he never remembers, and would have been out of his head to suggest we were not going to use this confession." (A. 115-116)

Determination of the matter was held in abeyance by the trial Court pending examination of the yet untranscribed pre-trial conference minutes, and pending a determination of whether the Pomares statement might be inadmissible for other reasons (A. 102-119).

Shortly thereafter, the Court advised counsel that the Court's law clerk's notes were in accord with the position of the defense, and a Court reporter was summoned to read the relevant portion of the stenographic notes of the pre-trial conference (A. 123-124). Following that reading, the Court declared:

"I think the record is pretty clear, and I think the Government having made its decision at one point, I am not going to let them reverse at trial. I think we had better go ahead and not use the statement." (A. 124)

Upon further protestations by the prosecutor, the Court responded:

"At pre-trial conference, the Government agreed to go ahead and try these two defendants and fix the date for trial. And when it was asked about the Bruton problem, they said there wasn't going to be any Bruton problem because the Government was not going to use the statement. So why do we reverse the field? I think I will stick to that.

"Mr. Littlefield: * * * It seems to me clear that this is a complete corroboration of our witness.

"The Court: I don't care about

that. Of course it is. The Government can't blow hot and cold on this. The Government made a commitment to the defendants' lawyers at this conference, and I am going to make the Government stick with it.

"Mr. Littlefield: As soon as I was in the case I informed both of them I intended to use the statement.

"The Court: You may have, but I am going to stick to that. I think the Government has got to adhere to a position, and I think we will just go ahead and try the case." (A. 124-126)

A discussion of the next turn of events first requires a brief summary of the Government's allegations as to the sequence of events involved in the making of the admission by Pomares. A more extensive analysis of those circumstances is set forth under Point II, <u>infra</u>, at p. 30.

On the day that the admissions were made, the defendant was arrested at his home at approximately 12:15 P.M. The group of arresting officers thereupon proceeded to search his home. The officers questioned him at his home, then during the automobile ride to their office, and, finally, at the agents' office, itself. At some point during these events, Agent Pinol, who acted as an interpreter, made handwritten notes of the conversation. Thereafter, the defendant was arraigned and

was released on bail. He never signed any statement and he never returned to further cooperate with the agents. Subsequently, Pinol gathered his handwritten notes into a typewritten report. That report was marked defendant's Exhibit A at the suppression hearing which was held during the course of the instant trial, and is reproduced at A. 800, et seq.

We now return to the events at trial which led to the admission into evidence of the defendant's alleged admissions.

Not having been dissuaded by the Court's exclusion of the alleged admissions upon the grounds of waiver and stipulation, Government counsel, later in the trial, adopted an imaginative but spurious line of argument predicated upon a distinction never before asserted in the history of the proceedings of this case:

"Mr. Littlefield: With respect to the ruling with regard to Pomares' written statement, Pomares also at the time, prior to the time he made the written statement, made a long and complete oral confession in which he corroborated everything that Barres had said, and also corroborated Veciana's involvement exactly as he did in the written statement.

"The Court: Who is going to testify to that?

"Mr. Littlefield: Agent Pinol, who heard that statement. We will

have to redact any references to Veciana, but it is an oral statement. If there is an issue as to suppression I will be glad to have the agents here at 9:30 in the morning and we can have that.

"[Counsel for the defendant Pomares]: We are getting caught into
a distinction without any difference
here. At the pre-trial conference
we had in this case, it had to do
with my client's statement at the
time of his arrest. I don't think
there is any doubt that your Honor's
ruling yesterday should apply.

"The Court: This is a different statement, I take it.

"Mr. Littlefield: Yes. It was a statement he made orally prior to the written one, your Honor. It is not the written statement which the initial discussion was about.

"[Counsel for defendant Pomares]:
Your Honor, there is absolutely no
doubt that at the pre-trial conference, this is exactly what we were
talking about. For the Government
to come in the back door, by some
oral statemen; made practically
contemporaneously with the written
statement or the later recorded
statement of the same day - - I
think it was - - I think just breaches
exactly what Mr. Bannigan said he was
not going to do.

"The Court: I haven't got the written statement here.

"[Counsel for defendant Veciana]: Let me further add this: This places me exactly back in the same <u>Bruton</u> situation that the written statement created.

"The Court: The date is sort of wiped cut.

"Mr. Littlefield: The date of the statement is July 29, which is when he was arrested. The top date is the date of the typing. [*] Pomares was arrested in Puerto Rico the 29th, and at the time he spoke to the agents, he indicated he was willing to cooperate and made this complete statement corroborating the events."

At the mid-trial hearing, Agent Pinol sought to distinguish between the interview reflected in the notes, and the interview which the Government claimed was not subject to the stipulation, as follows:

- "Q. Now, I believe you indicated previously that as Mr. Pomares was giving answers to questions, notes were made; is that correct?
- "A. In the first interview, no. The second interview, yes, sir.
- "Q. Where was the first interview?
- "A. The first interview was at our District Office in San Juan.
 - "Q. And the second interview?

^{*} The statement in question is dated as having been typed on August 2, 1973 (A. 800). Agent Pinol testified that the handwritten notes from which the typewritten statement was created were either destroyed or back at his office in Puerto Rico (A. 514). He characterized the relationship between the two sets of documents as follows: "I believe I put all the details from my rough notes in that [typewritten] report" (A. 515).

"A. The same place, sir.

"Q. What time was the first interview?

"A. It happened between 1:30 to 4:00.

"Q. And the second interview?

"A. It happened between 1:30 and 4:00.

"The Court: Both interviews were in the same period, between 1:30 and 4:00?

"The Witness: Yes.

"Q. How far apart were they?

"A. Well, I don't recall exactly what time, sir." (A. 507)

At the conclusion of the mid-trial hearing, defense counsel again moved that all such admissions be excluded upon the ground, inter alia, of waiver-stipulation (A. 537-540); and the Court denied the motion (A. 542). The motion was again reasserted before Agent Pinol was permitted to reveal the alleged admissions to the jury (A. 582), and was urged in support of the defendant's post-trial motion for a new trial (A. 779-781).

B. The Admission of the Statements Was Violative of Due Process and the Proper Administration of Justice in the Federal Courts

As conceded by the prosecutor, the admissions in question, if credited by the jury, were the strongest

evidence in the case (A. 104). There can be no doubt, therefore, that the defendant Pomares was thereby prejudiced. Additionally, counsel for the defendant Veciana made clear at the outset of the case that Veciana requested a severance if the admissions were to be used (A. 102), and the Government expressed its willingess to sever, at that point, under those circumstances (A. 107). The problem appeared to be solved by the Court's initial holding that the Government would not be permitted to use the statement in view of its prior waiver. It was not until the midst of trial (A. 297), that the Government raised the issue again, and successfully prevailed upon the Court to draw the spurious distinction between the so-called "written" statement, and the so-called "oral" statement. Appellant Veciana respectfully submits that, notwithstanding the failure of those alleged admissions to directly inculpate him, the positive effect of those admissions upon the jury and, particularly, upon the credibility of the Government witness, Barres, effectively swung the balance in the trial.

As shown by the above quoted excerpts from the transcript, the Government's pre-trial stipulation made no distinction between written and oral admissions; in fact, Pomares never made a written admission, in

that he never wrote or signed anything; and what we are really talking about are Pinol's revised notes of a continuing two and a half hour interrogation session with the defendant at the agent's office.

It is clear that "The use of stipulations in criminal as well as civil matters has long been recognized as proper" <u>United States</u> v. <u>Rodriguez</u>, 241 F. 2d 463 (7th Cir., 1957); to the same effect, <u>United States</u> v. <u>Schor</u>, 418 F. 2d 26, 29 (2nd Cir., 1969).

As noted by the American Bar Association Standards, Discovery and Procedure Before Trial (approved draft, 1970), § 5.3(d): "stipulations by any party or his counsel should be binding upon the parties at trial unless set aside or modified by the Court in the interests of justice."

In the present case, the Court made clear at the beginning of the trial that it would not set aside or modify the stipulation. Thus, even if the Court could properly have done so under the facts of this case, it did not, and the stipulation stands as the law of the case. Instead, the Court was led into the error of drawing a spurious distinction which is clearly not supported by the record.

In <u>Sullivan</u> v. <u>Scafati</u>, 428 F. 2d 1023 (1st Cir., 1970), the appellant argued that a pre-trial

stipulation by the prosecution precluded the prosecution from admitting certain admissions into evidence.

The Court of Appeals for the First Circuit characterized the factual situation as follows:

" * * * The stipulation in question made by the prosecution in response to a motion to sever the trial of the two defendants, stated that the prosecution would not introduce confessions or admissions by the defendant. In summing up its understanding of the undertaking, the Court asked, 'of either of the defendants, neither confessions nor admissions on the part of one defendant viz a viz the other?' to which the prosecutor replied, 'that's right.' The Supreme Judicial Court held that this stipulation related only to statements of one defendant that would implicate the other. Both the context of the motion for severance and the trial Court's explicit wording of its understanding supports this construction." (428 F. 2d at 1026)

The <u>Sullivan</u> case was, therefore, disposed of upon the ground that the stipulation covered only <u>Bruton</u> - type admissions. As held by the trial Court in the present case, that was clearly not the situation here. The Court of Appeals for the First Circuit, however, went on to state:

"We of course expect prosecutors to comply with the full spirit as well as the words of pre-trial stipulation and discovery." (428 F. 2d at 1026)

This Court should hold likewise for reasons

of policy, honor and fairness.

The following comment in a widely used text is applicable to the present situation:

"At the conclusion of the pretrial conference, or a continuance thereof, the Court might find it useful to ask defense counsel and the prosecutor if there are any constitutional issues which should be ventilated and resolved prior to any plea disposition or trial and to obtain from each an affirmative declaration on the record. This could also include asking defense counsel whether he and the defendant waive all other constitutional or procedural issues collateral to guilt or innocence then known to them. The purpose of having counsel on record in this respect is to avoid unnecessary further hearings and delay in bringing such issues to the Court's attention at the earliest possible time for decision. Also such declarations might later preclude successful post-conviction relief on a theory of waiver, unless there is a strong showing of ineffective assistance of counsel." Burnett, Pre-Trial Conference, Criminal Defense Techniques, § 20.05[2] at p. 20-17.

See also <u>Richardson</u> v. <u>United States</u>, 150 F.

2d 58, 64 (6th Cir., 1945); Orfield, <u>Criminal Procedure</u>

<u>Under the Federal Rules</u>, §§ 26:777-778, Vol. IV, at

pp. 374-379, and authorities cited therein.

The administration of justice should be evenhanded. How can it be fair, on the one hand, if a layman such as Pomares without counsel, can be held to

have irretrievably waived his right to remain silent and thus provide the Government with its strongest evidence, yet a similar, more voluntary and studied waiver by a Government attorney is permitted to be rescinded at trial? Once a defendant waives his right to remain silent, or his right to be searched, or his right to bring a timely suppression motion, or numerous other fundamental constitutional rights, he will rarely, if ever, be permitted to rescind the waiver. A fair and consistent construction of the rights of the litigants at a trial requires that the Government be held to no less a standard. That being so, the jury verdict should be set aside and the defendants should be granted a new trial at which the Government would be precluded from introducing into evidence on its direct case the alleged admissions of the defendant Pomares.

POINT II.

THE EVIDENCE AT TRIAL FAILED TO ESTABLISH THAT THE ALLEGED AD-MISSIONS OF THE DEFENDANT POMARES WERE VOLUNTARY OR THAT POMARES HAD BEEN PROPERLY ADVISED OF HIS RIGHTS.

A. The Underlying Facts

Shortly after noon on July 29, 1973, a squad of Federal agents descended upon the home of the defendant Pomares with a warrant for his arrest based upon admissions which had been made by the Government witness, Barres (A.304). The day was a Sunday, and the agents found Pomares at home with his wife and young children (A.327). They arrested him and then requested that he sign a consent for the search of his home. He did so, and the agents commenced a thorough search of his residence (A.305-6,328-331).

Two of the agents who were present during the search testified both at trial and during the midtrial hearing which was held concerning the voluntariness of Pomares' admissions. These were Agent Bruno (the undercover agent in the case), and Agent Pinol, who translated the conversations that were eventually held between Bruno and Pomares, and who wrote the re-

^{*} The search does not appear to have turned up anything of evidentiary value.

port of Pomares' alleged admissions (Defense Exhibit A; A. 800, et seq.).

Following the search, instead of attempting to bring Pomares before a Magistrate for arraignment upon the arrest warrant, the agents brought him back to their headquarters where they questioned him until about 4:00 P.M. (A. 334). According to both Bruno and Pinol, Pomares was given the Miranda warnings three times: first at his home, then in the automobile en route to headquarters, and finally at the headquarters (A. 305, 604-605). Each time he was advised of his rights, he was simultaneously advised that he faced heavy penalties, that he would be his own best lawyer, and that the wisest course of action would be to cooperate with the Government rather than to exercise his right to remain silent (A. 512, 570, 576, 602, 604-606). In this regard, the testimony of the agents speaks for itself:

Agent Pinol:

"Q. During the course of that day prior to his arraignment, did you hear anyone advising Mr. Pomares as to the possible results of his . . . prosecution and conviction in this case? * * * Did you tell him how much time he could go to jail for?

- "A. Yes, sir.
- "Q. What did you say?
- "A. He didn't say anything.
- "Q. What did you say?
- "A. Well, it was possible he can be sentenced to 15 years.
 - "Q. Just 15?
 - "A. Yes, sir.
- "Q. And did anyone tell him that it would be advantageous to him to cooperate?
 - "A. Oh, yes, sir.
 - "Q. Who told him that?
- "A. Mr. Bruno, and I translated to him in Spanish.
- "Q. Can you tell me what was said?
- "A. Mr. Bruno told him in English that the best lawyer he can ever have was his own person if he cooperated with the Government.
- "Q. The best lawyer he could ever have was his own self?
 - "A. Yes.
- "Q. And cooperate with the Government?
 - "A. That's correct." (A. 511-512)

Agent Bruno:

" * * * I says, - - through Pinol

I explained to him [Pomares] that anything he does to help us will in fact be helping him, because we already know the whole story and that we had him and we had him tight.

"Q. What happened after that?

"A. We removed him back to the DEA offices in San Juan, where I began to interview Mr. Pomares through Agent Pinol, who was acting as interpreter." (A. 570-571)

Bruno:

"Q. I recall that in describing your initial interview with Mr. Pomares you said - - may I have a moment to check my notes?

"The Court: Yes.

"Q. You told him that he was dead and in his own interest he had better come clean. Is that what you told him?

"A. Yes.

"Q. Did you say the same thing to Pomares upon encountering him?

"A. Yes, sir. I informed him that we had certain evidence against him that we believed was damaging and which when he was brought to trial would convict him.

"Q. Is that how you said it?

"A. Not exactly.

"Q. What did you say?

"A. I said, 'pal, we got you and got you good. You are going away for a ton of years.'

"Q. I see. Thereafter, you brought him to a Federal agency there in Puerto Rico. Is that correct?

"A. Yes, sir.

"Q. And you interviewed him?

"A. Yes, sir." (A. 576)

Agent Pinol:

"I recall Mr. Bruno told him that, 'you are in very deep trouble. The best lawyer is your own self, you cooperate with the Government.' " (A. 602)

Agent Pinol:

- "Q. While you may not recall specific words; do you recall as to whether such things were said?
- "A. I mentioned to you what Mr. Bruno told him, 'the best lawyer is yourself.'

"The Court: That was in the car?

- "The Witness: Mentioned again in the car.
- "Q. Did he also say that in the house?
 - "A. Yes, sir.
 - "Q. He said it twice?
 - "A. Yes.
- "Q. Then you arrived at some Government agency, is that correct?
- "A. San Juan District Office of the Drug Enforcement Administration, Old San Juan.

"Q. While you were there did
Bruno again make such statements to
Mr. Pomares?

"A. What statements?

"Q. Statements such as, and
I will give you by way of example,
'we have a lot of evidence against
you, you better cooperate, you don't
need a lawyer, your best lawyer is

"A. I believe so, he repeated that at the office, yes, sir."
(A. 604-605)

yourself,' words to that effect.

Agent Pinol went on to describe how the nature of Bruno's interrogation of Pomares, as translated by Pinol, was in the form of leading questions, apparent-ly based upon the allegations which had previously been made by Barres:

"Q. And would he ask questions such as this: 'Well, Mr. Pomares, didn't this happen and didn't that happen and didn't this happen?' Would he ask questions in that way, leading questions at times?

"A. He was asking if he recalled that this happened and that that happened, yes, sir.

"Q. Bruno would say, 'didn't this happen?'

"A. Yes, sir.

"Q. And then Pomares would say yes, that happened?

"A. And explain what happened.

"Q. And then explain it?

"A. Yes." (A. 606-607)

B. The Manner in Which Pomares Was Questioned and Advised of His Rights Failed to Meet Federal Constitutional Standards

The burden of establishing a waiver by the accused of his right to remain silent and of his right to counsel is on the prosecution. It is based on the rule that the waiver of a constitutional right will not be lightly inferred. Johnson v. Zerbst, 304 U.S. 458. This rule applies to in-custody interrogations, as was here the case, and "a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel" Miranda v. Arizona, 384 U.S. 436 at 475. A valid waiver will not be presumed simply from the fact that a confession was obtained, Carnley v. Cochran, 369 U.S. 506. Indeed, . . . the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege" Miranda v. Arizona, 384 U.S. at 476.

If psychological coercion is used in obtaining a confession, it can render the confession involuntary notwithstanding the fact that the interrogating agent went through the perfunctory ritual of advising the defendant as to his rights, <u>Gorman</u> v. <u>United</u>

<u>States</u>, 380 F. 2d 158 (1st Cir., 1967); <u>Colombe</u> v.

<u>Connecticut</u>, 367 U.S. 568.

In <u>United States ex rel. Williams v. Twomey</u>,

467 F. 2d 1248 (6th Cir., 1972), the Court condemned,
in the following words, purported warnings which tend
to encourage or mislead a defendant to forego his rights:

"The entire warning is, therefore, at best, misleading and confusing and, at worst, constitutes
a subtle temptation to the unsophisticated, indigent accused to forego
the right to counsel at this critical moment." (467 F. 2d at 1250)

imposed by the Miranda decision must be fully observed, and rights of suspects must be jealously guarded; not even the slightest circumvention or avoidance should be tolerated, United States v. Crisp, 435 F. 2d 354 (7th Cir., 1970), cert. denied, 402 U.S. 947. If legal advice is given an accused at a pre-trial interrogation, such advice must be accurate, United States ex rel. Vanderhorst v. LaVallee, 285 F. Supp. 233, aff'd., 17 F. 2d 411, cert. denied, McMann v. Vanderhorst, 397 U.S. 925.

Any reasonable doubt as to whether a defendant was properly informed of his right to remain silent must

be resolved in favor of the defendant, <u>United States</u>
v. <u>Mullings</u>, 364 F. 2d 173 (2nd Cir., 1966).

At the instant trial, it was made clear that the defendant Pomares, who had no prior criminal history (A. 534), was encouraged, indeed, practically, terrorized, into foregoing his rights. Every "warning" was contradicted by a contrary warning that the exercise of his rights would place him in deeper trouble than he was already in and would deprive him of the possibility of leniency. Additionally, he was improperly told that it was in his best interests to function as his own lawyer. This precise tactic was clearly condemned in Miranda v. Arizona, supra. Following a review of various impermissible strategems of psychological coercion, 384 U.S. at 447-457, the Supreme Court made clear that psychological intimidation or cajolery will not be tolerated, notwithstanding an otherwise proper recitation to a defendant of his rights:

" * * * Moreover, any evidence that the accused was threatened, tricked or cajoled into a waiver, will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation."

(384 U.S. at 476; emphasis added)

A case directly in point is presented in <u>Peo-ple v. Russell</u>, 66 Cal. Rptr. 594 (C.A. Dist., 1968), wherein it was held that advice such as that given in the instant case was constitutionally inadequate:

"In our opinion the adequancy of the warning given to appellant by Officer Acuna himself was destroyed by Acuna's supplementing that advice with 'it might be better for you if you talked.' This bit of gratuitous advice nullified and made ineffective his previous admonition to appellant to the contrary. At the very least it qualified and rendered unclear that which, under Miranda, must remain unqualified, clear and unequivocal.

"Since the admonitions given to appellant did not meet Miranda standards, we do not have to reach the question of whether the evidence is sufficient to support the trial Court's implied finding that appellant's response to Officer Acuna's questions were freely made. However, even if we were to regard Officer Acuna's advice that 'it might be better for you if you talked' as a separate inducement which did not detract from the preceding statement of rights, we would still be of the view that appellant's statement was inadmissible because Officer Acuna acted improperly. The applicable rule under pre-Miranda law was stated in People v. Hill, 66 Cal. 2d 536, 549, 58 Cal. Rptr. 340, 348, 426 P. 2d 908, 916, as follows: 'When the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we perceive nothing improper

in such police activity. On the other hand, if in addition to the foregoing benefit, or in the place thereof, the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, the prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible.' The words 'it might be better for you' when made, as in this case, to a suspect in the isolation of an interrogation room can too easily be interpreted as an implied threat or cajolery to be equated with a statement whose sole purpose is to point out to the suspect the benefit which 'follows naturally from a truthful and honest course of conduct.' " (66 Cal. Rptr. 599-600)

For the above reasons, the alleged admissions of the defendant Pomares should not have been revealed to the jury, and the judgment of conviction should, therefore, be reversed.

POINT III.

THE DEFENDANT POMARES WAS DE-PRIVED OF HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT BY THE TESTIMONY ELICITED FROM AGENT PINOL UNDER DIRECT EXAMINATION TO THE EFFECT THAT POMARES HAD REFUSED TO FUR-THER COOPERATE WITH THE GOVERNMENT AND HAD REQUESTED IMMUNITY.

A. The Underlying Facts

while the Government sought to draw some kind of an illusory distinction between oral statements given by Pomares prior to the note-taking (allegedly not

precluded from evidence by the prosecution's stipulation), and the events which thereafter followed (allegedly covered by the prosecution's stipulation), the Government, itself, did not even pretend to observe such a distinction when it went on to continue its direct examination of Agent Pinol by eliciting from him the fact that Pomares exercised his right to terminate "cooperation" once he made bail and had a lawyer, and, further, that immunity had been requested in the defendant's behalf.

The prosecutor's direct examination of Agent Pinol before the jury proceeded as follows after Pinol's recitation of Pomares' alleged admissions:

"Q. Now, after this had been done, was Mr. Pomares arraigned before the Judge in Puerto Rico?

"A. Yes, sir.

"Q. And did you make arrangements to see him again at that point?

"A. Yes, sir. Mr. Pomares promised to come back to the office as soon as he made bail and make a statement, sign the statement, but he never did. The same Sunday when he was taken before the Chief Judge for arraignment, and the Judge set bail for \$100,000.

"Q. But then he didn't come back the next day?

"A. Well, he was in jail the

next day.

"Q. Did he come back when he got out of jail?

"A. No, sir.

"Q. Did you try to contact him to see if he still wanted to cooperate?

"A. I talked to his lawyer and I talked to him and he promised to come back but he wanted immunity.

"[Counsel for Pomares]: May we have a Bench conference at this point, your Honor?

"The Court: Yes.

(At the side Bar)

"[Counsel for Pomares]: I am thoroughly taken by surprise by what has just occurred. This is obviously a comment upon my client's exercise of his right to remain silent and it's thoroughly improper. It's a violation of his Fifth Amendment right. I had no indication about it.

"[Prosecutor]: This is the end. We just wanted to show that he didn't come back.

"[Counsel for Pomares]: I had no indication of this.

"The Court: Don't go any further than this." (A. 592-593)

Thereafter, when the jury was excused, counsel for the defendant Pomares, moved for a mistrial upon the ground that "the witness, Pignol, had, I think, indica-

ted to the jury that my client exercised his Fifth Amendment right. I believe that in and of itself is a violation of his rights and is likely to prejudice the jury against him" (A. 618-619).

B. The Revelation to the Jury of the Defendant Pomares' Claim of Fifth Amendment Privilege Constituted an Impermissible Violation of that Privilege

As early as its decision in Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court of the United States made crystal clear that, having answered some questions, an accused has an absolute right to invoke his privilege at any time during in-custody interrogation, and the fact of such exercise of the right may not be revealed to the jury:

"In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. Cf. Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1, 8 (1964); Comment, 31 U.Chi. L. Rev. 556 (1964); Developments in the Law - Confessions, 79 Harv. L. Rev. 935, 1041-1044 (1966). See also Bram v. United States, 168 U.S. 532, 562 (1897)." (384 U.S. at 468, fn. 37)

Indeed, Miranda, stated the point twice:

" * * * Moreover, where in-custody interrogation is involved, there is no

room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated." (384 U.S. at 475-476)

For all of the above reasons, it is respectfully submitted that the revelation to the jury that
the defendant had invoked his privilege, was, itself,
a violation of the privilege. Pinol's testimony violated defendant's Fifth Amendment right. That violation was compounded by the fact that Pinol was led by
the prosecutor into giving such testimony. It was further compounded by the fact that the prosecutor's
questioning violated the spurious distinction which
the Government, itself, had drawn (see Point I, supra,
pp. 21-22).*

^{*} In this connection, it is also relevant to note that the witness Barres, whose testimony reveals him to be somewhat of a prima donna, gratuitously volunteered on cross-examination that the defendant Pomares would be the best source of information (A. 419, 424). A motion for a mistrial based upon Barres' assertions, was denied (A. 435-436).

POINT IV.

THE JURY SHOULD HAVE BEEN CHARGED, AS REQUESTED BY THE DE-FENSE, THAT IF THEY FOUND THE ALLEGED POMARES STATEMENT UNRELIABLE, THEY WERE ENTITLED TO COMPLETELY DISREGARD IT.

The defense submitted to the trial Court a written request to charge as follows:

"Weight to be Given Alleged Admission

"There has been evidence at this trial that, following his arrest, the defendant Pomares admitted to some extent that he participated in the transaction charged by Count II of the indictment. Whether or not he, in fact, made such an admission is a question for you to determine.

"The defense has argued that the circumstances under which Mr. Pomares allegedly made the admission rendered the admission unreliable. The question of its reliability is also one for you to determine. As with all other evidence in the case, if you find that he did, in fact, make such an admission, you should give it such weight as you feel it deserves under all the circumstances. If you find that it is without reliability, you may disregard the alleged admission altogether. (Lego v. Twomey, 404 U.S. 477, 485-486; 18 U.S.C. § 3501[a]) " (A. 799)

At a conference in advance of summations, the trial Court advised that the requested charge would be "denied except as charged" (A. 656).

In its charge to the jury, the Court referred to the issue only in the following way:

"In considering these statements, ladies and gentlemen, give them such weight as you think they deserve under all the circumstances which have been brought out in the evidence in the case." (A. 748)

At the conclusion of the charge, defense counsel took exception as follows:

"[Counsel for defendant Pomares]: I request the Court charge that the jury may completely disregard the confession or the alleged admission of my client.

"The Court: No, I wouldn't charge that." (A. 754-755)

In <u>Lego</u> v. <u>Twomey</u>, 404 U.S. 477, at 485-486 (1972), Mr. Justice White, speaking for the majority,

held:

" * * * The procedure we established in <u>Jackson</u> [v. <u>Denno</u>, 378 U.S. 368] was designed to safeguard the right of an individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances. Nothing in Jackson questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as free since Jackson as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness. In like measure, of course, juries have been at liberty to disregard confessions

that are insufficiently corroborated or otherwise deemed unworthy of belief." [Emphasis added]

We respectfully submit that the trial Court's passing reference to the fact that the jury might give such "weight" to the confession as it deserved under the circumstances, did not sufficiently apprise the jury of its right to completely disregard the alleged confession if it deemed it to be unreliable. If a jury has such a right, as Lego makes clear it does, then it should be told of that right in no uncertain terms. Assuming, arguendo, that the charge as given might, to lawyers, have essentially the same meaning as the charge as requested, it must be realized that the jurors were not lawyers and cannot be expected to completely disregard such evidence unless they are clearly told that it is within their province to do so.

Since the Court refused to give the requested charge, the judgment of conviction, as against Pomares, should be reversed. Similarly, for the reasons set forth <u>infra</u>, under Point V., the defendant Veciana was prejudiced by the failure to give the requested instructions since it is unlikely that the jury viewed the evidence against him without taking into account the corroborative effect which Pomares' confession had upon the credibility of Barres.

POINT V.

THE DEFENDANT VECIANA SHOULD HAVE BEEN GRANTED A SEPARATE TRIAL FROM THE DEFENDANT POMARES.

As has already been shown, <u>supra</u>, Point I, at pp. 17 -29, the Government, in advance of trial, was willing to disregard the Pomares statement completely and, thus, precluded any further discussion of Veciana's request for a severance (A. 19). When the Government sought to rescind its prior stipulation on the first day of trial, Government counsel declared his willingness to try both defendants separately (A. 107, 112-113, 116). Indeed, at one point, the Government, itself, moved that the defendants be granted separate trials (A. 126-127).

When the Court held that the Government was precluded, by virtue of its prior stipulation, from using the Pomares confession at all, the problem ceased exist. However, when the Court reversed itself, sub silencio, counsel for Veciana immediately took exception based upon the rule of Bruton v. United States, 391 U.S. 123 (1968)

(A. 298-300).

While it is true that <u>Bruton</u>, <u>supra</u>, concerned itself with the direct inculpation of a defendant by the confession of another defendant, the true problem against which <u>Bruton</u> sought to safeguard was nonetheless present in the instant case. In providing the jury with the de-

details of Pomares' confession, even though references to Veciana were redacted from it, the Government was able to provide clear-cut corroboration for the testimony of Barres.

In <u>Bruton</u> v. <u>United States</u>, <u>supra</u>, at pp. 135-137, the Court held, <u>inter alia</u>:

> " * * * Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually in-advertently. * * * It is not unreasonable to conclude that in many such cases the jury can and will follow the trial Judge's instructions to disregard such information. Nevertheless, as was recognized in Jackson v. Denno, supra, there are some contexts in which the risks that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. * * * Such a context is presented here, where the powerfully incriminating extrajudicial statements of a co-defendant who stands accused side by side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of

such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the confrontation clause was directed. * * *

"We, of course, acknowledge the impossibility of determining whether in fact the jury did or did not ignore Evan's statement inculpating petitioner in determining petitioner's guilt. But that was also true in the analagous situation in Jackson v. Denno, and was not regarded as militating against striking down the New York procedure there involved. It was enough that that procedure posed 'substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined. These hazards we cannot ignore.' 378 U.S. at 389. Here, the introduction of Evan's confession posed a substantial threat to petitioner's right to confront the witnesses against him, and this is a hazard we cannot ignore. Despite the concededly clear instructions to the jury to disregard Evan's inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all. * * * "

The appellant Veciana respectfully urges that the principle implicit in <u>Bruton</u> was violated in the instant case, to his prejudice, since, by his alleged confession, the defendant Pomares necessarily became

an unsworn witness who corroborated the testimony of Barres to a far greater extent than any of the other corroborative witnesses in this case. The jury could hardly have been expected to ignore that corroboration.

In the alternative, the denial of a severance was an abuse of discretion. Rule 14, F.R.Cr.P; 8 Moore's Federal Practice, Cipes, Criminal Rules, ¶8.02[1],p.8-3 (1970).

POINT VI.

THE DEFENDANTS VECIANA AND POMARES WERE WRONGFULLY PREJUDICED AND DEPRIVED OF THEIR RIGHT AGAINST SELF-INCRIMINATION BY THE PROSECUTOR'S ARGUMENT TO THE JURY THAT THEY SHOULD HAVE COOPERATED WITH THE GOVERNMENT, AS DID BARRES, INSTEAD OF PROTESTING THEIR INNOCENCE.

The prosecutor argued in summation:

. . the Government did get the cocaine. So that has been protected from going out in the street. But now who holds the key to the funnel of cocaine up from Bolivia through this route? Who holds that key but Mr. Veciana? Let's remember that. Let's remember the different roles each of them played in this transaction. Veciana, the man who had the contacts in Bolivia; Pomares and Barres, the men who were going to sell it here. Remember, neither was going to talk about the people they dealt with. Each of them was going to have their separate functions. So no one knows but Veciana. Only he knows who the sources are in Bolivia. So although we have stopped this shipment of cocaine this time, only Veciana could stop - by giving the Government the information, stop the flow of cocaine up from Bolivia." (A. 691)

It is true that, at the immediate request of the defense, the Court instructed the jury to disregard the prosecutor's argument (A. 692). Nevertheless, the prosecutor immediately went on to comment:

"With respect to Barres, he has cooperated with what he knew." (Tr. 619)

Appellants respectfully submit that the prosecutor's argument was an improper reflection upon the defendants' right to remain silent and right to stand trial. The harm having been done, the Court's instruction could not eradicate it. Moreover, in apparent disregard of the Court's ruling, the prosecutor went on to make what can only be construed as an unfavorable comparison between the stance of the defendants, in remaining silent, and the stance of the Government's key witness, in "cooperating." Such argument has been condemned as a violation of the Fifth Amendment privilege. See argument set forth under Point III, supra, at pp. 43 - 44, and see also: Deats v. Rodriquez, 477 F. 2nd 1023 (10th Cir., 1973); People v. Christman, 23 N.Y. 2d 429, 297 N.Y.S. 2d 134 (1969).

Due to this criticism of the exercise of the Fifth Amendment privilege, the judgments of conviction should be reversed.

POINT VII.

THE PROSECUTOR'S SUMMATION IMPROPERLY DISTORTED THE TESTIMONY OF THE PROSECUTION WITNESS, LOPEZ, TO THE PREJUDICE OF BOTH DEFENDANTS, AND THEREBY CONVERTED THAT TESTIMONY INTO A VIOLATION OF THE RIGHTS OF THE DEFENDANT POMARES UNDER BRUTON V. UNITED STATES, 391 U.S. 123.

It will be recalled that, a day or so before the sale by Barres to the undercover agent, a meeting was held at the Florida apartment among Barres, Veciana and Pomares. According to Barres, the unexpected arrival of two of his friends, Lopez and Figueroa, caused Veciana to leave the apartment before turning over the cocaine. After the two visitors left, Pomares returned to the apartment allegedly claiming that the transfer had been accomplished in the parking lot (supra, pp.13-14).

Both Figueroa (A. 462-481) and Lopez (A. 482-489) testified concerning their arrival and concerning the departure of Pomares and Veciana. Later, claiming merely, "I neglected to ask Mr. Figueroa a question" (A. 498), and "I just have one further question from Mr. Figueroa" (A. 499), the prosecutor was permitted to call Figuroa back to the stand, "for one question" (A. 499).

Upon being recalled, the prosecutor asked a series of questions which established that, four or five days before trial, Veciana met with the witness

Lopez (A. 501). When asked the substance of that conversation at that time, Lopez responded:

"He asked me to tell the truth. Not to tell anything that was not the truth. I told him that it what I would do, to tell that they were there when I arrived. So I think there must be some misunderstanding because they left soon after I arrived, first Pomares and then Veciana." (A. 500) [Emphasis added.]

Further questioning by the prosecutor elicited the fact that there had been a discussion between Lopez and Veciana as to the length of time that Pomares and Veciana remained in the apartment after the visitors arrived, i.e., whether Veciana left "right after Mr. Pomares left" or whether he waited "a few minutes" (A. 501). The witness' conclusion as to the true facts was expressed as follows: "He asked me to say that there was some time between both of them left. There was some, but very, very little. It was very fast. * * * I told him that I would say just the truth" (A. 501; emphasis added).

On cross-examination, Lopez again verified that Veciana told him to tell the truth (A. 502).

Nowhere in the trial testimony or the pre-trial statements of Lopez is there any indication that Veciana, in fact, endeavored to persuade Lopez to lie. Nevertheless, the prosecutor argued in summation:

" * * * . . . now, if there were any confession of guilt, it's going to be a witness and trying to get him to testify that people left separately, when, in fact, they left together. Then, of course, Mr. Veci-ana said, 'but tell the truth. Tell the truth.' Mr. Veciana is no dummy. He is not going to tell him to lie. If he should get Mr. Lopez to say they left separately, that would put the lie to Barres because Barres said they left together, but they were going off to switch the cocaine. So you can see Mr. Veciana practically standing up and admitting by going to a witness and trying to get that witness just a few days before trial to testify that they left separately, when in fact, Lopez, Figueroa, and Barres said they left together." (Tr. 629)

knew what Barres had told the authorities concerning the meeting and the sequence of departure (see Point IX, infra, at pp.65 - 70). Similarly, Lopez' testimony is that there was some difference in the departure time of the two men. In any event, the Government argued that Veciana's post-conspiracy statements and activities were inculpatory. Since the event in question involved the interaction of Veciana and Pomares, an alleged admission of guilt by Veciana was necessarily inculpatory of Pomares. The argument in question was, therefore, a clear violation of Pomares' rights under Bruton v. United States, as set forth supra, Point V,

at pp. 48-51.

Defense counsels' efforts to have the problem remedied or corrected were denied (A. 726-727, 755). It is respectfully submitted that the prosecutor's argument was unfair to both defendants, and that the rights of the defendant Pomares to be confronted by and to cross-examine the witnesses against him were directly violated, thus requiring a new trial.

POINT VIII.

AT TRIAL, THE GOVERNMENT IMPROPERLY EXPANDED THE SCOPE OF THE INDICTMENT TO COVER CRIMES NOT CHARGED IN THE INDICTMENT. MOREOVER, THE DEFENSE WAS NOT ADVISED IN ADVANCE OF TRIAL THAT THE GOVERNMENT HAD SO EXPANDED THE SCOPE OF THE INDICTMENT.

The original indictment in this case was filed on August 10, 1973, and was in two counts. The first count charged the defendants with a conspiracy commencing November 1, 1972, and alleged four overt acts, all of which occurred on July 23, 1973 - the day of the sale to the undercover agent (A. 5-6). The second count of the original indictment charged the defendant Pomares, alone, with having possessed with intent to distribute seven kilos of cocaine on July 23, 1973 (A. 7).

On January 4, 1974, merely two business days before the trial commenced, the Government filed a superseding indictment (A. 8-10). The only differences between the original indictment and the superseding indictment were that two overt acts were added to the conspiracy count alleging that on July 21, 1973, Veciana delivered the cocaine to Pomares and Barres (A. 9); additionally, the second count of the original indictment was changed to also charge Veciana with the sale

of July 23, 1973.

During the Government's opening to the jury, the defense and the Court were advised for the first time that the Government's case would include allegations that the defendants had engaged in substantial narcotics transactions prior to those mentioned in the indictment. This expansion of the charges of the indictment was particularly offensive in that the superseding indictment had been filed just a few days before the trial commenced.

At the conclusion of the Government's opening to the jury, the defense unsuccessfully moved for a mistrial upon this ground (A. 143-145), and that motion was renewed throughout the trial (A. 191, 618). Failing to have the evidence excluded, the defense unsuccessfully moved to have it stricken (A. 648-650).

As a result of the Court's rulings, a substantial part of the testimony of the witness Barres concerned transactions not included in the indictment and occurring prior to the time period covered by the indictment: the first transaction - April, 1972 through August or early September, 1972 (A. 166-200; see pp. 9 - 11, supra); the second transaction - August, 1972 through April, 1973 (A. 200-232; see pp. 11-12). The indictment, it-

self, only charged the third transaction which occurred during the period from April, 1973 through July, 1973 (A. 233-295, 348-353; see pp.12-15, supra).

In an effort to justify its position to the jury, the Government improperly sought to "explain" the omission of those charges from the indictment upon the theory that the charges could not be made since the narcotics which formed the subject matter of those transactions were not in the possession of the Government (A. 706)* - indeed, a novel theory which, if true, would invalidate numerous indictments.

In <u>United States</u> v. <u>Byrd</u>, 352 F. 2d 570 (2nd Cir., 1965), this Court stated the long-standing rule which trial Courts must follow in exercising their discretion as to whether evidence of a defendant's "other crimes" should be admitted or excluded. The following statement, as applicable to this case as to that, is found in Byrd:

"The exercise of discretion must be addressed to a balancing of the probative value of the proffered evidence, on the one hand, against its prejudicial character, on the other." (352 F. 2d at 574)

^{*} The prosecutor argued: "It's a smokescreen. It's like you puff up smoke to distract from what's going on. For instance, [counsel for Pomares] says that the first two transactions are described are not spelled out in the indictment. Well, of course they are not spelled out in the indictment. We don't have the co-caine" (A. 706).

Byrd went on to specify an important factor to be used in weighing the admissibility of such evidence:

"The ['other crimes'] evidence came from the mouth of the same witness, Kaufman, who testified to the occurrences in the first two counts. If the jury believed his testimony as to those counts, the relating of the . . . [other criminal] incident added little, if anything, to a revelation of Byrd's state of mind. If they had disbelieved Kaufman's testimony about the first two counts, it is not very likely they would have believed his story about the . . . [other criminal event]."

Here, it was Barres who testified to <u>all</u> of the transactions. Thus, the reasoning of <u>Byrd</u> is applicable here.

This Court went on to note: "Another factor to be considered is whether the Government was faced with a real necessity which required it to offer the evidence in its main case" (352 F. 2d at 575). Noting that the challenged evidence was offered on the question of the defendant's intent - - an issue which the defendant had not yet "snarpened" - - and that the government did not "suffer from a lack of evidence of intent", this Court concluded: "There was, therefore, no pressing necessity that evidence of the prior occurrence be offered on the Government's main case" (352 F. 2d at 575).

Barres' testimony as to the transactions specified in the indictment left no room for the issues of intent, knowledge or anything similar. The rule which ought to have been followed, therefore, was summed up in Byrd at p. 575:

"Where the prejudice is substantial and the probative value, through the nature of the evidence or the lack of any real necessity for it, is slight, its admission at that stage [i.e., during the government's main case] may be held to be an abuse of discretion."

Barres' testimony as to the prior transactions did not enhance the Government's case in any legitimate way. There was no issue as to knowledge or intent - according to Barres the participants discussed the plot for the third transaction in detail and everyone knew precisely what they were doing.

The practical prejudice to the defendants which resulted from the addition of the prior two transactions to the charges of the indictment was that the defense was completely unprepared to meet Barres' claims. If more than lip service is to be given to the presumption of innocence, it must be assumed that the defendants knew nothing of the alleged prior transactions. See, for example, the reasoning of Judge (later Justice) Whittaker in United States

v. Smith, 16 F.R.D. 372 (W. D. Mo., 1954), where, ruling on discovery motions, he stated that the presumption of innocence obliged Courts to assume that a defendant is unaware of the details of the crimes charged against him. To announce for the first time during its opening that it intended to prove that the conspiracy was far greater than that charged in the indictment and commenced prior to the time specified in the indictment, was nothing less than a deprivation to the defense of an opportunity of defending against the charge. It was a trial by ambush. The record contains no justification for the Government's failure to give the defendants any notice, through the indictment or otherwise, of its intention to introduce such proof.

The vice of the Government's tactics is not only that it caught the defense unawares, but also that it further emphasized the defendants' failure to ir roduce any rebuttal evidence as to those transactions. While it is true that the jury was charged that the defense had no obligation to produce any evidence, the Government's introduction of these additional crimes certainly fed upon the jurors' natural tendencies to take the lack of contradiction into account in reaching

their verdict.

The expansion of the indictment by the Government requires that the judgments of conviction be reversed.

POINT IX.

IN HIS SUMMATION, THE PROSECU-TOR BECAME AN UNSWORN WITNESS AGAINST THE DEFENDANTS BY PLACING BEFORE THE JURY, 1N SUMMATION, ALLEGED FACTS WHICH WERE NOT SHOWN BY THE EVIDENCE.

During the direct examination of Barres, the prosecutor led the witness to the point of his own arrest and confession:

- "Q. Then did you continue to make statements as to what had happened?
- "A. Yes. I - he didn't accept the statements until I had a lawyer with me, and I finally was - I got the telephone book and I had a lawyer, because I knew civil lawyers but I had never heard - I didn't know about criminal lawyers, and I obtained the service of an attorney Solomon, and he came and he told me of all my rights and if I wanted to confess - I said why am I going to confess, it was true that I had the baggage on my room, and it was true that I was going to sell it to him.
- "[Counsel for defendant Pomares]: Your Honor, I would object to some recitation of prior extrajudicial statements made by this witness.
- "The Court: All right. You say they brought this lawyer Solomon, and you said you just wanted to go through and tell them the facts, is that right?
 - "The Witness: Correct.
- "Q. Did you speak to other officers for a number of days in debriefing, so to speak?

"A. No. I - - During that day I went through my confession, saying what I had done, but that was the next day after being put in detention. Then after that I didn't talk more to anybody." (A. 351-352)

Detective Bruno appears to have been present during all or part of the interrogation of Barres.

During the direct examination of Bruno, it was elicited from him that Barres had made a number of statements after being arrested. As to the content of those statements, only the following was the subject of testimony:

"A. * * * On the morning of the 24th as a result of information from Mr. Barres' testimony or statements, we flew down to Miami, Florida, and executed a warrant at - I don't know the exact numerals of the address but it's on Tamiani Drive in Miami, Florida, which is the International Houses, the Italian Village, where Mr. Barres was residing. And behind the stove in a secreted compartment of the cabinets we found an additional three kilos of cocaine and a scale.

"Q. Now, Barres told you or brother officers about the fact that this cocaine and the scale was down there?

"A. Yes, sir.

"Q. You didn't know about it from any other source?

"A. No." (A. 565)

Of course, Barres had been a trial witness, and the prosecutor was entitled to use any part of his testimony in summation. The prosecutor went further,

however, and argued to the jury that Barres' testimony should be believed because "each detail" of Barres' statements to the authorities upon his arrest was thereafter corroborated by the evidence which the subsequent investigation uncovered. This was the theme of much of the prosecutor's summation, as we shall shortly demonstrate. A motion for a mistrial upon the ground that the prosecutor had resorted to facts outside the record was denied by the trial Court (A. 725-726).

Turning to the text of the prosecutor's summation, we find the following:

"When I say it boils down to that basic or roundabout picture, the other thing it boils down to is that the only corroboration you have seen in this case has substantiated what Barres said. That corroboration was in documents. He didn't know what documents were going to be found by the Government when he made his statement. So he was taking a risk if he was making it up. In fact at each point there could have been a document, there it is.

"Then we had the people witnesses, the Nunezes, the Figueroas, the Carpios. Each of them corroborated an important detail of Barres' testimony. Wherever there was a person who could be brought into corroborate, in short, he was there corroborating. Barres didn't know they were going to be available. Wherever these mens' conspiracy ran into someone else, that person was here, if he was an innocent person. We didn't get the diplomat, we didn't get those people yet." (A. 692)

"Now, it also comes down with respect to Barres' testimony, I think really the most telling detail is that Mr. Barres told the Government about the three kilograms in Florida. He told the Government about the fact that he had been involved in two previous shipments of five kilos and nine and a half or ten kilos. The Government didn't know anything about that. He, Mr. Barres, got on the stand and he also told the Government, as Mr. Bruno said right after he'd been arrested, he told them about the three kilos in that apartment down in Florida. If you were going to cover up or make up a story, you certainly aren't going to incriminate yourself to the tune of three more kilograms of cocaine. You certainly are not going to turn over the scales. You are certainly not going to say, yes, sure enough, I did five other kilos the year before, and I did ten other kilos six months before. That would be absolutely insane." (A. 703)

"It's at that point [i.e., upon his arrest] that Barres just opens up. Barres tells about the three kilos, tells about Veciana, tells about Pomares, tells about everything that happened. He tells about the other two shipments. I reiterate, why in the world would he tell about these other three kilos? Why would he incriminate himself about these other five kilos and the other nine and a half kilos if it weren't the truth right down the line?" (A. 722)

In view of the above, it is clear that, in summation, the prosecutor testified to the jury about the alleged content of Barres' confession, including his alleged inculpation of the defendants - - indeed, according

to the prosecutor, Barres accurately told the authorities about "everything."

In his concurring opinion, in which the other two members of the Panel also concurred, in <u>United</u>

States v. <u>DeAngelis</u>, 400 F. 2d 1004 (2nd Cir., 1974),

Circuit Judge Mansfield wrote as follows:

"Recently, we have had occasion to take prosecutors to task for improperly asserting their personal knowledge of facts or their personal belief as to the credibility of witnesses. United States v. White 486 F. 2d 204, 205-07 (2nd Cir., 1973); United States v. Bivona, - F. 2d - (2nd Cir., Nov. 1, 1973), slip opn. 253, 256-62, United States v. Santana, 485 F. 2d 365, 370-71 (2nd Cir., 1973); United States v. Drummond, 481 F. 2d 62 (2nd Cir., 1973); United States v. LaSorsa, 480 F. 2d 522, 526 (2nd Cir., 1973), cert. denied 482 U.S.L.W. 3197 (Oct. 9, 1973); United States v. Fernandez, 480 F. 2d 726, 741 n. 23 (2nd Cir., 1973); United States v. Miller, 478 F. 2nd 1315, 1317 (2nd Cir., 1973), cert. denied, 482 U.S.L.W. 3197 (October 9, 1973); United States v. Pfingst, 477 F. 2d 177 (2nd Cir., 1973), cert denied, 481 U.S.L.W. 3645 (June 12, 1973). ** * * " (490 F. 2d 1004, at 1011)

The central issue in this case concerned the credibility of the Government witness Barres. By enhancing that credibility through the device of referring to the alleged accuracy of the details of Barres' post-arrest confession, the prosecutor not only overstepped the bounds of propriety, but directly trampled upon the defendants' Sixth Amendment rights. For that

reason, and predicated upon the authorities set forth in Judge Mansfield's concurring opinion in <u>DeAngelis</u>, <u>supra</u>, defendants respectfully submit that the judgments of conviction should be reversed.

CONCLUSION

For all of the above reasons, the judgments of conviction should be reversed.

Respectfully submitted,

HENRY J. BOITEL Attorney for Appellants

Of Counsel:

BARRY L. GARBER ABRAHAM H. BRODSKY

